Hoong Wai Kit v Teh Toong Joo (Boonsri Kanjanawadee (f), party cited)

HIGH COURT (SHAH ALAM) — DIVORCE PETITION NO F-33–958 OF 2011
ZAKIAH KASSIM JC
16 MARCH 2017

Family Law — Divorce — Decree nisi granted — Application by petitioner husband for variation of custody, care and control order; and variation of maintenance order — Whether there was any misrepresentation or mistake of fact or material change in circumstances involving welfare and best interest of child which warranted custody order to be varied — Whether there was any misrepresentation or mistake of fact or material change of circumstances which warranted maintenance order to be varied — Divorce and Matrimonial Proceedings Rules 1980 rr 65 & 67

The petitioner husband ('the petitioner') and the respondent wife ('the respondent') were married on 8 July 2003 and they were blessed with two daughters ie Regina and Priscilla. On 19 November 2010, the petitioner had applied for sole guardianship, custody, care and control of the children and subsequently, on 29 August 2011, the petitioner petitioned for divorce as well as other prayers including sole guardianship, custody, care and control of the children. The High Court had granted the amended decree nisi containing order for the custody, care and control of Regina given to the petitioner whereas the custody, care and control of Priscilla given to respondent ('the order'). The present action was in relation to the notice of application for ancillary relief filed by the petitioner in encl 68. The petitioner claimed that there had been material changes in the circumstances as provided under ss 96 and 83 of the Law Reform (Marriage and Divorce) Act 1976 that warranted a variation of the order ie the orders for custody of Priscilla and the maintenance of the respondent. In relation to this application, the petitioner and the respondent had appointed psychologist and psychiatrist to examine Priscilla. Dr Alex Ng Wei Siong and Assoc Prof Dr Mary Joseph Marret had been appointed by the petitioner whereas the respondent had consulted Dr Yusni and Ms Soo Siew Bee to examine Priscilla. The issues for determination were: (a) whether there was any misrepresentation or mistake of fact or material change in the circumstances involving the welfare and best interest of Priscilla which warranted the custody order to be varied; and (b) whether there was any misrepresentation or mistake of fact or material change of circumstances which warranted the maintenance order to be varied.

Held, allowing the application by the petitioner for variation of custody, care

and control order and dismissing the application by the petitioner for variation on maintenance order for the respondent:

(1) The notice of application for ancillary relief in Form 11 was the proper mode that had been used by the solicitors for the petitioner to file an application to vary the order. The registrar had proceeded the application with an investigation by virtue of r 65 of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules'). Upon the completion of the investigation, the registrar had produced a report in writing which contained an estimate of the relief to which, in the registrar's opinion, the applicant would be entitled if the application were granted. This was in line with r 67 of the Rules (see paras 16 & 21–22).

(2) For the court to vary the order of maintenance of a spouse, the court must satisfy that the order was based on any misrepresentation or mistake of fact or where there had been any material change in the circumstances. However, the petitioner had failed to prove any of these grounds in order to satisfy the court to vary the order on the maintenance of the respondent (see paras 56–57).

(3) The petitioner managed to prove to the court the material changes in the circumstances that warranted the court to make an order for variation of the custody, care and control of Priscilla. Mistreatment received by Priscilla from the other family members of the respondent in Penang was unacceptable. The fact that Priscilla was living with all of them under the same roof must be highly taken into consideration to ensure the well-being of Priscilla at all times. Priscilla's firm intention to stay in Kuala Lumpur with her father, sister, paternal grandmother and paternal grandfather had been clearly reflected based on the interview sessions with the registrar as well as the medical reports prepared by Dr Alex Ng and Dr Mary Joseph Marret. In addition, during the investigation, the petitioner managed to explain to the court his long-term and future plan for Priscilla which was more convincing to the court to transfer the custody, care and control order to the petitioner (see paras 58–59).

[Bahasa Malaysia summary

Pempetisyen suami ('pempetisyen') dan responden isteri ('responden') telah berkahwin pada 8 Julai 2003 dan mereka dikurniakan dengan dua anak perempuan iaitu Regina dan Priscilla. Pada 19 November 2010, pempetisyen telah memohon untuk hak penjagaan, jagaan, pemeliharaan dan kawalan tunggal terhadap kanak-kanak dan kemudiannya, pada 29 Ogos 2011, pempetisyen mempetisyen untuk perceraian dan juga permohonan-permohonan lain termasuk penjagaan, jagaan, pemeliharaan dan kawalan tunggal terhadap kanak-kanak. Mahkamah Tinggi memberikan decree nisi yang dipinda yang mempunyai perintah untuk jagaan, pemeliharaan dan kawalan Regina diberikan kepada pempetisyen sementara

jagaan, pemeliharaan dan kawalan Priscilla diberikan kepada responden ('perintah tersebut'). Tindakan ini adalah berkaitan kepada notis permohonan bagi relief sampingan yang difailkan oleh pempetisyen di dalam lampiran 68. Pempetisyen mendakwa bahawa terdapat perubahan material di dalam keadaan seperti yang diperuntukkan di bawah ss 96 dan 83 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 yang mewajarkan kepelbagaian perintah iaitu perintah untuk jagaan Priscilla dan penyenggaraan responden. Berkaitan permohonan ini, pempetisyen dan responden telah melantik psikologi dan psikiatri untuk memeriksa Priscilla. Dr Alex Ng Wei Siong dan Assoc Prof Dr Mary Joseph Marret telah dilantik oleh pempetisyen sementara responden telah berunding dengan Dr Yusni dan Ms Soo Siew Bee untuk memeriksa Priscilla. Isu-isu untuk penentuan adalah: (a) sama ada terdapat apa-apa misrepresentasi atau kesilapan fakta atau perubahan material dalam keadaan melibatkan kebajikan dan kepentingan terbaik Priscilla yang mewajarkan perintah jagaan dipelbagaikan; dan (b) sama ada terdapat apa-apa misrepresentasi atau kesilapan fakta atau perubahan material keadaan yang mewajarkan perintah penyenggaraan dipelbagaikan.

Diputuskan, membenarkan permohonan oleh pempetisyen bagi pelbagaian perintah jagaan, pemeliharaan dan kawalan dan menolak permohonan oleh pempetisyen bagi pelbagaian perintah penyenggaraan untuk responden:

(1) Notis permohonan untuk relif sampingan di dalam Borang 11 adalah cara yang betul yang telah digunakan oleh peguam bagi pempetisyen untuk memfailkan permohonan untuk mempelbagaikan perintah tersebut. Pendaftar telah meneruskan permohonan dengan siasatan mengikut k 65 Kaedah-Kaedah Prosiding Perceraian dan Hal-Ehwal Suami-Isteri 1980 ('Kaedah-Kaedah'). Setelah siap penyiasatan, pendaftar telah mengemukakan laporan bertulis yang mengandungi anggaran relif tersebut yang mana dalam pendapat pendaftar, pemohon akan berhak jika permohoan tersebut dibenarkan. Ini adalah selari dengan k 67 Kaedah-Kaedah (lihat perenggan 16 & 21–22).

(2) Untuk mahkamah mempelbagaikan perintah penyenggaraan pasangan, mahkamah mesti memenuhi bahawa perintah adalah didasarkan atas apa-apa misrepresentasi atau kesilapan fakta atau di mana terdapat apa-apa perubahan material dalam keadaan. Walau bagaimanapun, pempetisyen telah gagal untuk membuktikan apa-apa daripada alasan ini untuk mematuhi mahkamah untuk pelbagaian perintah atas penyenggaraan responden (lihat perenggan 56–57).

(3) Pempetisyen dapat membuktikan kepada mahakmah perubahan material di dalam keadaan yang mewajarkan mahkamah untuk membuat perintah bagi pelbagaian jagaan, pemeliharaan dan kawalan ke atas Priscilla. Penganiayaan yang dilakukan terhadap Priscilla daripada ahli-ahli keluarga responden yang lain di Pulau Pinang adalah tidak boleh

A diterima. Fakta bahawa Priscilla tinggal dengan kesemua mereka di bawah satu bumbung mesti diambil kira dalam pertimbangan untuk memastikan kesejahteraan Priscilla pada kesemua masa. Hasrat kukuh Priscilla untuk tinggal di Kuala Lumpur dengan bapanya, adik perempuan, nenek dan datuk telah secara jelas dibayangkan berdasarkan sesi temubual dengan pendaftar dan juga laporan perubatan yang disediakan oleh Dr Alex Ng dan Dr Mary Joseph Marret. Dalam tambahan, semasa penyiasatan, pempetisyen dapat menjelaskan kepada mahkamah pelan jangka panjang dan masa depan untuk Priscilla yang mana lebih meyakinkan kepada mahkamah untuk memindahkan perintah jagaan, pemeliharaan dan kawalan kepada pempetisyen (lihat perenggan 58–59).]

Notes

D For cases on decree nisi granted on divorce, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4194–4198.

Cases referred to

Ngu Chu Chiong @ Ngu Choo Chiong v Lina Soo [2008] 3 MLJ 42; [2008] 2 E CLJ 783, CA (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 rr 2, 56, 63, 65, 65(5), 67

F Law Reform (Marriage and Divorce) Act 1976 ss 83, 96

Honey Tan Lay Ean (Woeng Ching Ee, Sarah Ann Yong Jen Lee and Chong Rei Yen with her) (Tan Law & Practice) for the petitioner.
Caroline Goh (Halim Hong & Quek) for the respondent.

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Zakiah Kassim JC:

INTRODUCTION

H **[1]** This is my judgment regarding the notice of application for ancillary relief filed by the petitioner husband in encl 68.

BACKGROUND OF FACTS

I **[2]** The petitioner husband and the respondent wife were married on 8 July 2003 at Thean Hou Temple Kuala Lumpur. Their marriage was blessed with two daughters ie Regina Hoong Yun Qi ('Regina') born on 8 July 2002 and Priscilla Hoong Yun Ting ('Priscilla') born on 4 February 2006, currently aged 15 and 11 respectively.

[3] On 19 November 2010, the petitioner husband had amongst others applied for sole guardianship, custody, care and control of the children vide Originating Summons No 24–2656 of 2010 and subsequently on 29 August 2011 petitioned for divorce with respondent wife as well as other prayers including sole guardianship, custody, care and control of the children vide Divorce Petition No F-33–958 of 2011. A B

[4] On 16 May 2013 after a full trial, the learned High Court judge, Justice Yaacob bin Hj Md Sam (as he then was) granted the said amended decree nisi containing order for custody, care and control of Regina given to the petitioner husband and of Priscilla given to the respondent wife with access to the respective children for the parties. C

[5] Priscilla has been residing in a house in Bukit Mertajam, Penang with seven to eight other people ie the respondent, the respondent's mother and the respondent's brother, his wife, and their three children ie Natalie (13 years old), Desmond (11 years old) and Theresa (9 years old). Priscilla's living arrangement as such was in place until now, since she was taken away by the respondent wife from the parties' matrimonial home at No 22A, Jalan PJU 1A/43B, Ara Damansara, 47301 Petaling Jaya, Selangor Darul Ehsan on the night of 2 October 2010 when Priscilla was only about 4+ years old. D E

[6] The petitioner husband claimed that there have been material changes in the circumstances as envisages under ss 96 and 83 of the Law Reform (Marriage and Divorce) Act 1976 that warrants a variation of the order as prayed for in encl 68. F

[7] Later on, the petitioner husband has filed an application on 10 June 2015 by way of notice of application for ancillary relief ('Form 11') to vary orders for custody of the children and also the maintenance of the spouse ie the respondent wife ('the encl 68'). G

[8] By referring to the encl 68, the petitioner husband prays that the decree nisi dated 16 May 2013 be varied as follows: H

1.1 Paragraph 2 of the decree nisi which states that:

> The custody, control and care of the child of the marriage namely Priscilla Hoang Yun Ting (Birth Certificate No 060204–14–1150) be given to the Wife Respondent. I

Be varied as follows:

> The custody, control and care of the child of the marriage namely Priscilla Hoang Yun Ting (Birth Certificate No 060204–14–1150) be given to the Husband Petitioner;

A 1.2 Paragraph 3 of the decree which states that:

> The Husband Petitioner be given access to Priscilla Hoang Yun Ting on every first week and third week of every month from Friday at 3pm until Sunday at 6.30pm. In 2014, the Respondent shall send Priscilla to and pick her up from the Penang airport, but from 2015 onwards, Priscilla shall be picked up from Autocity, Bukit Mertajam. Penang, but she will be returned at the Penang airport.

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Be varied as follows:

> The Wife Respondent be given access to Priscilla Hoong Yun Ting on every second week and fourth week of every month from Friday at 8pm until Sunday at 6pm;

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1.3 Paragraph 5 of the decree nisi which states that:

> The Husband Petitioner be given access to Priscilla Hoong Yun Ting for three days ie from Monday until Wednesday at 8pm on the first week of the first mid-term school holidays, mid-term holidays and second mid-term school holidays. This means that if Priscilla Hoong Yun Ting is in the access period by the Husband Petitioner during the first week and third week access then the said Monday access is considered as continuing until Wednesday at 8pm.

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E Be varied as follows:

> The Wife Respondent be given access to Priscilla Hoong Yun Ting for three days ie Wednesday at 8pm until Saturday at 8pm on the first week of the first mid-term school holidays, mid-term holidays and second mid-term holidays. This means that if Priscilla Hoong Yun Ting is in the access period by the Wife Respondent during the second week and fourth week access then the said Wednesday access is considered as continuing until Sunday at 6pm;

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1.4 Paragraph 7 of the decree nisi which states that:

> The Wife Respondent be given access to Regina Hoon Yun Qi on alternate years commencing from year 2013 for an access of fifteen (15) days during the year end school holidays where the access in year 2013 is from 15 December until 29 December 2013 and the access in year 2014 is from 1 December until 5 December which means that the said child will be under the Wife Respondent's access for Christmas Day celebrations on alternate years and this alternate year access will continue in the following years. Regina shall be picked up at 1pm at 1 Utama Shopping Centre in Bandar Utama, Selangor and shall be returned at 6.30pm at 1 Utama Shopping Centre in Bandar Utama, Selangor.

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Be varied as follows:

> The Wife Respondent be given access for Regina Hoong Yun Qi on alternate years commencing from year 2013 for an access of fifteen (15) days during the year end school holidays where the access in year 2013 is from 15 December until 29 December and the access in year 2014 is from 1 December until 15 December which means that the said child will be under the Wife Respondent's access for Christmas Day celebrations on alternate years and this alternate years access will continue on the following years. Regina Hoong Yun Qi shall be

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picked up at 1pm and shall be returned at 6.30pm;

1.5 Paragraph 8 of the decree nisi which states that:

> The Husband Petitioner be given access to Priscilla Hoong Yun Ting on alternate years commencing from year 2013 for an access of 15 days during the year end school holidays where the access in year 2013 is from 1 December until15 December and the access in year 2014 is from 15 December until 29 December which means that the said child will be under the Husband Petitioner's access for Christmas Day celebrations on alternate years and this alternate year access will continue in the following years. Priscilla shall be picked up at 1pm at Autocity, Bukit Mertajam, Penang.

Be varied as follows:

> The Wife Respondent be given access to Priscilla Hoong Yun Ting in alternate years commencing from year 2016 for an access of fifteen (15) days during the year end school holidays where the access in year 2016 is from 1 December until 15 December and the access in year 2017 is from 15 December until 29 December which means that the said child will be under the Wife Respondent's access for Christmas Day celebrations on alternate years and this alternate year access will continue in the following years. Priscilla Hoong Yun Ting shall be picked up at 1pm and shall be returned at 6.30pm;

1.6 Paragraph 10 of the decree nisi which states that:

> The Husband Petitioner and the Wife Respondent respectively shall keep the passport of the children under their custody and is required to submit to the other party if requested for purposes of overseas vacation and the said passport must be returned within seven (7) days to the respective party after the children return from overseas.

Be varied as follows:

> The Husband Petitioner shall keep the passports of Regina Hoong Yun Qi and Priscilla Hoong Yun Ting and is required to give them to the Wife Respondent if requested for purposes of overseas vacation and the said passport(s) must be returned within seven (7) days to the Petitioner Husband after the children return from overseas;

1.7 Paragraph 11 of the decree nisi which states that:

> The Husband Petitioner is required to forward Priscilla Hoong Yun Ting's birth certificate to the Wife within fourteen (14) days from the date of this Decree.

Be varied as follows:

> The Wife Respondent is required to forward Priscilla Hoang Yun Ting's birth certificate to the Husband Petitioner within (14) days from the Order of this Court;

1.8 Paragraph 12 of the decree nisi which states that:

> The Husband Petitioner and the Wife Respondent in alternate years are given

A access to both children during the Chinese New Year celebrations on which the access will start from 1pm on the second day of Chinese New Year, the Chinese New Year access for year 2014 will begin with Wife Respondent, year 2015 with the Husband Petitioner and continues on alternate years.

Be varied as follows:

B The Wife Respondent in alternate years are given access to both children during the Chinese New Year celebrations in which the access will start from 1pm on the eve of Chinese New Year access for year 2016 will begin with the Wife Respondent, year 2017 with the Husband Petitioner and continues on alternate years;

C 1.9 Paragraph 13 of the decree nisi which states that:

The Husband Petitioner shall be given access to Priscilla Hoang Yun Ting on the said child's birthday every year, starting in year 2014, ie the access on 4 February for Priscilla Hoong Yun Ting's birthday, with access time given from 2pm until 8pm if the said child on the date concerned is under the care of the Wife Respondent.

D Be varied as follow:

The Wife Respondent shall be given access to Priscilla Hoong Yun Ting on the said child's birthday on alternate years, starting in year 2016, ie, the access on 4 February for Priscilla Hoong Yun Ting's birthday, with access time given from 2pm until 8pm;

E 1.10 Paragraph 14 of the decree nisi which states that:

The Wife Respondent shall be given access to Regina Hoong Yun Qi on the said child's birthday every year, starting in year 2014, ie the access on 8 July from 2pm until 8pm if the said child on the date concerned is under the care of the Husband Petitioner.

F Be varied as follows:

The Wife Respondent shall be given access to Regina Hoong Yun Qi on the said child's birthday on alternate years, staring in year 2017, ie the access on 8 July from 2pm until 8pm;

G 1.11 Paragraph 15 of the decree nisi which states that:

The Husband Petitioner and the Wife Respondent be given access on alternate years to the said children on Mother's Day or Father's Day celebrations whichever is applicable where the access time is given from 9am until 7pm of the said Children on the date concerned is under the care of the other party on that day.

H Be varied as follows:

The Wife Respondent be given access to the said Children on Mother's Day celebrations where the access time is given from 9am until 7pm;

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1.12 Paragraph 15A of the decree nisi which states that:

> For avoidance of doubt, the parent having access to the child shall pick up an drop off the said child to the other party together with another child if it is the other party's access to the other child.

Be varied as follows:

> For avoidance of doubt, the Wife Respondent having access to the child and/or the Children shall pick up the said child and/or Children from the Husband Petitioner at the Kuala Lumpur International Airport of Kuala Lumpur International Airport (2) or Subang Airport, whichever is applicable as informed by the husband Petitioner to the Wife Respondent, at the times stated herein and drop off the said child and/or the Children to the Husband Petitioner at the Penang International Airport at the times stated herein;

1.13 Paragraph 16 of the decree nisi which stated that:

> The Husband Petitioner and the Wife Respondent be given access to keep in contact through handphone with the respective children (Regina Hoong Yun Qi and Priscilla Hoong Yun Ting) who is under the custody of the other party once in each week for a conversation period 15 minutes until 30 minutes on the day and time which will be mutually agreed by the parties.

Be varied as follows:

> The Wife Respondent be given access to keep in contact through handphone with the respective children (Regina Hoong Yun Qi and Priscilla Hoong Yun Ting) once in each week for a conversation period of 15 minutes until 30 minutes on the day and time which will be mutually agreed by the parties;

1.14 Paragraph 17 of the decree nisi states that:

> The Husband Petitioner shall pay maintenance for the child namely Priscilla Hoong Yun Ting in the sum of RM1,200 per month and the said payment shall be deposited into the Wife Respondent's account which has been provided and the said payment must be made not later than the seventh day at the beginning of each calendar month. This said sum shall include payment for all food, day-care, transport costs.

Be varied as follows:

> The Husband Petitioner shall pay maintenance for the child namely Priscilla Hoong Yun Ting in the sum of RM1,200 per month;

1.15 Paragraph 18 of the decree nisi states that:

> The Husband Petitioner shall bear the cost of the education which shall not exceed RM500 per month, medical and dental treatment for the child namely Priscilla Hoong Yun Ting and the bills for such purposes shall be delivered by the Wife Respondent to the husband Petitioner within a reasonable length of time and the Husband Petitioner is required to pay the Wife Respondent or the party

claiming for the payment in accordance with the amount stated in the bills concerned within thirty (300 days from the date of receipt of the said bills. The Husband Petitioner shall only be responsible to pay for a maximum of three (3) dental visits by Priscilla per year.

Be varied as follows:

The Husband Petitioner shall bear the cost of education which shall not exceed RM500 per month, medical and dental treatment for the child namely Priscilla Hoong Yun Ting;

1.16 Paragraph 19 of the decree nisi which states that:

The Husband Petitioner shall pay a monthly maintenance of RM1,000 to the Wife Respondent and the said payment shall be made not later than the 7th day of each month by depositing the said amount into the Wife Respondent's bank account which has been provided for the said purpose.

Be varied as follows:

The Husband Petitioner shall not pay the Wife Respondent any maintenance from the date of this Order;

1.17 A new para 24 be added in the decree nisi to state as follows:

The Husband Petitioner shall arrange and pay for the child and/or the Children and the Wife Respondent's air tickets in respect of the child and/or the Children and the Wife Respondent's journey between Penang International Airport and Kuala Lumpur International Airport or Kuala Lumpur International Airport (2) or Subang Airport whenever the Wife Respondent is exercising her access to the children pursuant to paragraphs 3, 4, 5, 6, 7 and 8 herein, for a maximum of ninety two (92) round trips per month only and until the respective child is eighteen (18) years old. The Wife Respondent shall bear the costs of the transportation for herself, the child and/or the children in respect of any trips exceeding the said two (2) round trips per month;

1.18 A new para 25 be added in the decree nisi to state as follows:

The Husband Petitioner shall pay to the Wife Respondent the lump sum of RM30,000 in lieu of future monthly maintenance within fourteen (14) days from the Order of this Court and thereafter, the Wife Respondent shall have no further claims against the Husband Petitioner for maintenance for herself;

1.19 Each party shall bear his or her own costs in respect of this application.

THE GOVERNING LAWS

[9] It is pertinent to take note on the governing laws and follow the proper procedure with regards to this application of variation for custody and maintenance order.

[10] Section 96 of the Law Reform (Marriage and Divorce) Act 1976 empowers court to vary orders for custody or maintenance of a child. It stated:

> 96 Powers for court to vary orders for custody or maintenance.
>
> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

[11] Whereas s 83 has laid down the power of the court to vary orders for maintenance of a spouse which stated:

> 83 Power for court to vary orders for maintenance.
>
> The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where the has been any material change in the circumstances.

[12] This notice of application for ancillary relief has been filed by the petitioner husband solicitors according to the provision of r 56 of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules 1980').

[13] By virtue of r 2 of the Rules 1980, it has defined the word 'ancillary relief' which stated:

> 2 Interpretation
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> (1) In these Rules, unless the context othetwise requires —
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> ...
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> 'ancillary relief' means—
>
> (e) a variation order;
>
> ...

[14] Rule 56 of the 1980 Rules provides:

> 56 Application by petitioner or respondent for ancillary relief.
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> ...
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> (3) An application by a petitioner or respondent for ancillary relief, not being an application which is required to be made in the petition or answer shall be made by notice in Form 11.

[15] In the Court of Appeal case of *Ngu Chu Chiong @ Ngu Choo Chiong v Lina Soo* [2008] 3 MLJ 42; [2008] 2 CLJ 783, His Lordship Zulkefli Makinuddin JCA (as he then was) said the following:

A ... We are of the view the learned judge of the High Court erred in law in holding that the petitioner's application by way of summon in chambers dated 2 November 1998 is procedurally correct and proper when in fact it contravenes the provisions of the rules set out in the Divorce and Matrimonial Proceedings Rules 1980 ('the 1980 Rules') read in conjunction with the provisions of the Act. Rule 2(1) of the B 1980 Rules defines 'ancillary relief' to mean, inter alia, a variation order which includes an order for maintenance under s 83 of the Act. Rules 56(1) and (3) of the 1980 Rules provide that an application for ancillary relief which is required to be made in the petition or answer shall be made by notice in Form 11 as set out in the Schedule to the 1980 Rules. Rule 91(1)(b) of the 1980 Rules provides that except C where otherwise provided by the 1980 Rules, every application in a matrimonial proceeding shall be made by summons ...

[16] This clearly shows that this notice of application for ancillary relief Form 11 is the proper mode that has been used by the petitioner husband D solicitors to file an application to vary the order for the custody and maintenance of a spouse based on the order that has been given by the court on 16 May 2013 in the said amended decree nisi.

[17] Further, r 63 of the 1980 Rules provides:

E 63 Evidence on application for variation order.

(1) An application for a variation order shall be supported by an affidavit by the applicant setting out full of particulars of his propetty and income and grounds in which the application is made.

F (2) The respondent to the application may, within 14 days after service of the affidavit, file an affidavit in answer.

[18] Based on this application for ancillary relief, there is a provision under the 1980 Rules that gives power to the registrar to conduct an investigation for G the allegations that has been made by any parties in their affidavits.

[19] According to the r 65(5) of the 1980 Rules, it stated that:

65 Investigation by registrar of application for ancillary relief.

H ...

(5) At the hearing of an application for ancillary relief the registrar shall, subject to Rules 66, 68 and 69, investigate the allegations made in support of an in answer to the application and may take the evidence orally and may order the attendance of any person for the purpose of being examined or cross-examined, and may at any I stage of the proceedings order the discovery and production of any document or require further affidavit.

(6) The registrar may at any stage of the proceedings give directions as to the filing and service of pleadings and as to the further conduct of the proceedings.

...

[20] Upon completion of the investigation by the registrar under r 65, the registrar shall report the result thereof in writing to a judge to whom the application shall be adjourned. This registrar's report shall contain and estimate of the financial relief to which, in his opinion, the applicant is entitled and of the relief to which, in the registrar's opinion, the applicant would be entitled of the application. The registrar's report shall be filed and any party shall be entitled to inspect the report and to be supplied with a copy on payment of the prescribed fee. On the hearing of the application, the judge may confirm or vary the registrar's report or make such order as he thinks just. This has been envisaged based on r 67 of the 1980 Rules.

[21] The registrar has proceeded this application with an investigation by virtue of r 65 of the 1980 Rules. The registrar has, upon the power that has been conferred upon her, directed the solicitors to file relevant documents and order the attendance of the related parties for the purpose of being examined and cross-examined during the proceeding. The order of the discovery and the production of the relevant documents have also been ordered by the registrar during the investigation.

[22] Upon the completion of the investigation, the registrar has produced a report in writing which contains an estimate of the relief to which, in the registrar's opinion, the applicant would be entitled if the application were granted. This is in line with the r 67 of the 1980 rules.

THE ISSUES FOR DETERMINATION

[23] Custody of Priscilla Hoang Yun Ting:

(a) whether there is any misrepresentation or mistake of fact or material change in the circumstances involving the welfare and best interest of Priscilla Hoang Yun Ting which warrants the custody order concerned to be varied.

[24] Maintenance of the spouse:

(a) whether there is any misrepresentation or mistake of fact or material change of circumstances which warrant the maintenance order to be varied.

MISREPRESENTATION, MISTAKE OR ANY MATERIAL CHANGE IN THE CIRCUMSTANCES

Issue on custody, care and control

A **[25]** This variation application for custody, care and control is focusing on Priscilla, the second daughter of the petitioner husband and the respondent wife. The court will look into the established facts whether there is any misrepresentation or mistake of fact or material change of circumstances in order to give the power to the court to vary the order. In addition to this, the **B** paramount consideration is the best interest and welfare of the child in order for the court to allow the variation order application filed by the petitioner husband.

Environment in Penang

C

[26] Based on the facts of the case, it is undisputed that Priscilla is living with seven other persons at the house in Bukit Mertajam, Penang that consists of the grandmother, uncle, uncle's wife, cousins and also including her mother, the respondent wife.

D

[27] There was a time where the respondent wife and Priscilla moved out from the house and stayed in respondent wife's brother's house in Penang Island. They moved out because of the misunderstanding that had occurred in between the respondent wife with her mother. During this period of time, **E** Priscilla had to wake up very early in the morning to go to school since her school is situated in the mainland. However, the respondent wife has informed the court that they have moved in again into the Bukit Mertajam's house after few months. Currently, they are living in Bukit Mertajam house.

F

[28] Priscilla has a very tight schedule during weekdays. She has to get up early in the morning to go to school and the respondent wife will send her every morning. After school, Priscilla will go to the day care centre until around 6–7pm. The respondent wife is working and cannot take care of her after **G** school. Priscilla will be having her lunch and dinner at her day care centre.

[29] Priscilla has admitted that she is unlikely to have a meal together with the whole family in Bukit Mertajam house. Usually, she will only eat after the rest have finished their eating.

H

Relationship of Priscilla with the relatives

[30] It can be seen that Priscilla does not have a very good relationship with her relatives from her mother's side. This has been affirmed by Priscilla herself **I** during the interview session.

[31] There were few incidents which can illustrate the relationship between Priscilla and her relatives. For instance, her uncle ie the respondent wife's brother had threatened and beaten Priscilla using belt when Priscilla wanted to

watch television after 9.30pm. The respondent wife confirmed this but she claimed that her brother was just 'playing' and she believes that her brother's intention just wanted to teach Priscilla.

[32] By looking at the relationship that Priscilla has with her cousins, the former expressly mentioned to the registrar during the interview session that she is not going along well with them. Priscilla informed that she always gets bullied by her cousins and they have always fight. Priscilla feels that she is not welcomed in the family since her relatives did not treat her well including her grandmother.

[33] There was also one incident has occurred in December 2013 where the respondent wife has brought the children to the brother's house. Regina has been slapped by her uncle ie the respondent wife's brother known as Teh Tong Kheng during the respondent wife's two weeks access to Regina.

[34] Regina had witnessed how Priscilla was being kicked by the respondent wife's nephew, Desmond. Because of this, Regina had pushed Desmond away from Priscilla which resulted her uncle ie Teh Thong Kheng to slap her. The police report No J/20140114/2056 dated 4 January 2014 has been exhibited in exh 'HWK9' of encl 69/exh P11. The petitioner husband has also affirmed his affidavit on 31 March 2014 and filed in the Singaporean Court in respect of the physical abuse perpetrated by Teh Tong Kheng against Regina in exh 'HWK18' of encl 78/exh P12. The notes of evidence dated 11 April 2014 prepared by the Singapore District judge has also been exhibited as exh 'HWK10' of encl 69/exh P13.

[35] This incident was known to the respondent wife and has also been asserted by Priscilla herself. During the interview session with the registrar, Priscilla has informed the latter about this incident where she had a quarrel with Desmond and Regina was just trying to protect her by pushing Desmond. However, their uncle had come and slapped Regina.

[36] The petitioner husband also submits that there was a consistent violent tendencies and use of vulgar and insulting names against the children amongst the family members of the respondent wife. This has been affirmed by the children as well during the interview session with the registrar. This court is of the view that this kind of environment is not really healthy and Priscilla's welfare and best interest should be put into consideration.

Medical report

[37] The petitioner husband and the respondent wife have appointed the psychologist and psychiatrist to examine Priscilla. Dr Alex Ng Wei Siong and

A Assoc Prof Dr Mary Joseph Marret have been appointed by the petitioner husband whereas the respondent wife has consulted Dr Yusni and Ms Soo Siew Bee to examine Priscilla.

B **[38]** Priscilla has been a patient to Dr Alex Ng since December 2011 at Subang Jaya Medical Centre. There are four psychological reports prepared by Dr Alex Ng. These reports dated 5 September 2014, 17 April 2015, 19 May 2015 and 6 February 2016. The reports elaborated the condition of Priscilla and the diagnosis has been made.

C **[39]** Priscilla expressly mentioned about her desire to stay in Kuala Lumpur with her father, sister, paternal grandmother and paternal grandfather. She could describe how the family members in Kuala Lumpur treated her well and how happy she is while staying in Kuala Lumpur.

D **[40]** Unlike the family members of the respondent wife in Penang, Priscilla has been treated badly where she felt stressful at home as she always being bullied by her cousins. Priscilla suffered psychological stress as the family members in Penang ignored her. Priscilla felt more relaxed in teacher's house as it was more free and easy with others.

E

[41] Dr Alex Ng has suggested in his report that Priscilla should be referred to child psychiatrist at University Hospital.

F **[42]** Priscilla had then been referred to Assoc Prof Dr Mary Joseph Marret, a consultant paediatrician from University Malaya Medical Hospital and medical report dated 19 March 2015 was prepared by her.

[43] By referring to this medical report, it is again clearly shown Priscilla's
G desire to stay in Kuala Lumpur with her father and other family members. Priscilla could tell how the family members in Penang treated her. She was always being bullied and when she was asked to describe what she meant by bullying, she said that when she was seated on the sofa watching television, her uncle would pinch her and her grandfather would hit her head. Even her
H cousins would also hit her. She demonstrated a slapping action with gestures by Desmond, one of her cousins towards her.

[44] From the report, it can be seen that Priscilla loves her mother very much. She did not talk negatively about the respondent wife as her mother.
I However, the respondent wife did not take the complaint made by Priscilla with regards to the treatment by the other family members in Penang towards Priscilla seriously. The respondent wife was of the view that they were just 'playing' with Priscilla. This had also been averred by the respondent wife her during interview session with Dr Mary Joseph Marret which was also in the

presence of medical social worker. Even though Priscilla informed her mother that she was being hit, scolded and ostracised by the other family members. The respondent wife might not directly witness to this act of bullying which rendered her to have that kind of impression.

[45] Priscilla had expressed her desire for acceptance and better treatment in her mother's family members. She is at risk of long-term emotional harm if she is compelled to live in Penang with this unhealthy environment. The recommendation made by Dr Mary Joseph Marret is that the child's view and her best interest should be taken into account in any decisions regarding her custody, care and access.

[46] During the investigation conducted by the registrar, the respondent wife has called upon Dr Yusni bt Yusuff and also Ms Soo Siew Bee as her witnesses. Dr Yusni is a psychiatrist form Hospital Sultan Abdul Halim, Sg Petani, Kedah whereas Ms Soo Siew Bee is a clinical psychologist from Hospital Lam Wah Ee, Pulau Pinang. They have prepared medical reports with regards to Priscilla' condition.

[47] Based on the report made by Ms Soo Siew Bee dated 8 July 2015, she can describe Priscilla as well-presented girl and she was very cooperative while talking about her school and family. She has been assessed for her current level on emotional and behavioural functioning. Mother's and teacher's ratings on the child behavioural checklist revealed that she has not significant externalising or internalising difficulty.

[48] Now, we proceed with the medical report that has been prepared by Dr Yusni. In her report, it has been elaborated about Priscilla's daily routine and how she felt about living with the family members of the respondent wife. It is contradicted with what has been reported in the medical report prepared by Dr Alex Ng and also Dr Mary Joseph Marret. Priscilla had informed Dr Yusni, based on her report, inter alia, that Priscilla felt happy staying with her mother and other family members. However, there is one paragraph in the report that mentioned about Priscilla and her mother has once moved to the other house when there was an issue with regard to the ill-treatment towards Priscilla by the other family members. This can be a strong evidence to corroborate the petitioner's husband averments that Priscilla has been mistreated by the family members of the respondent wife. This is also consistent with the medical reports prepared by Dr Alex Ng and Dr Mary Joseph Marret where it explains about the treatment that has been received by Priscilla in Penang. However, the diagnosis made by Dr Yusni towards Priscilla was 'tiada sebarang diagnosis psikiatri'.

[49] It must be noted that the sessions that have been conducted by Dr Yusni were on 7 July 2015 and also follow up-treatment on 9 August 2015. Unlike the treatments and sessions that have been received by Priscilla in Kuala Lumpur, there are continuous assessment made by Dr Alex Ng since December 2011 and this shows the treatment provided by the latter is more extensive in order to produce more reliable report.

Interview with the children

[50] After all, interview with the children is the most vital part in order to determine the wishes of the child. This relates to the determination of the court to consider all aspects for the best interest of the child. When the interview was conducted by the registrar, Priscilla is already ten years old. At this age, she can expressly state her views, desires and wishes of her own. Therefore, this interview session will be highly taken into consideration for the best interest and welfare of the child with regards to the custody, care and control issue.

[51] One interview session with the children has been conducted by the registrar for the purpose of the investigation pursuant to r 65 of the 1980 Rules. The outcome of the interview has been reported in the registrar's report dated 31 December 2016. Since the registrar had the opportunity to have interview session with the children, to get the direct evidence from them and to see the demeanour of the children, I would like to refer the excerpts from the registrar's report with regard to the outcome of the interview session with the children:

> ...
>
> (viii) Interview of the children by the registrar
>
> 57. The interview session that has been conducted by the registrar with Priscilla and Regina can be considered as the most crucial part of the investigation. From this interview session, the registrar can see and ask directly any matters related to them.
>
> Priscilla
>
> 58. The interview session started with Priscilla. Priscilla has introduced herself and explained to the registrar about her daily routine. She is staying with her mother and she needs to go to the school from Monday until Friday which is located in Bukit Mertajam, Penang.
>
> 59. On Saturday and Sunday, she usually will stay in Penang and do the cleaning of the house.
>
> 60. On school days, she will go to the day care centre and will only arrive home at 6.30pm. If she has exam on the following day, she will arrive home at 7pm as she needs to do extra revision at the day care centre.
>
> 61. She mentioned to the registrar that she feels not very happy about this and she does not want to go to the day care centre as the teacher treats her 'sometimes good

sometimes bad'. The teacher has always asked her to finish her homework and it depends on the teacher to give her homework. Her teacher's name is Cikgu Wong.

62. On Wednesday, Priscilla has tuition at school but during the exam week there is none.

63. There is no school activity during the weekend. Priscilla has many friends and she enjoys going to school. She just feels a bit tired with her daily schedule.

64. The breakfast will be prepared by the mother and lunch will be prepared by the teacher at the day care centre. For the dinner, it depends. Sometimes it will be prepared by the mother and sometimes Priscilla will have dinner at the day care centre.

65. Priscilla's hobby is dancing. She has dancing class for every Wednesday night.

66. When the registrar asked her about how does she feels staying with her mother, she replied 'okay-okay lar'.

67. She is staying with the other family members ie uncle and aunty with three children and also maternal grandparents.

68. Even though they are living together, but during the meal time, they did not eat together. It is because Priscilla always comes back home late. There are times where the grandmother cooks for the dinner and sometimes her mother will cook for the dinner.

69. Priscilla has informed also that in many occasion where she will do her own things alone and not mingle around with her cousins. She does not have a good relationship with her cousins and she is not happy with this.

70. Priscilla has a good relationship with her sister, Regina.

71. When registrar asked about her relationship with the respondent wife as her mother, Priscilla informed the registrar that her mother was fierce before this but she never beats her and never teach her to do homework. Priscilla is always alone and she will spend time together with Regina during the long holidays.

72. Priscilla also told the registrar that during the weekend, if she is in Penang, she will be staying at home only and sleeping until 11am. She got less time with her mother and rarely go for an outing with the respondent wife. Futhermore, respondent wife is working on Saturday until 1pm and left her alone at home.

73. Priscilla has mentioned to the registrar during the interview that she not really loves her grandmother. Her grandmother keeps the biscuit that have been given to her by the petitioner husband but Priscilla still can eat it.

74. Priscilla without having second thought has informed the court that she loves Kuala Lumpur much more. She likes to stay in Kuala Lumpur. She can ask for anything and definitely she can get it from her father ie the petitioner husband. Priscilla will go to Kuala Lumpur twice a month and always go for 'jalan-jalan' while she is in Kuala Lumpur.

75. When the registrar asked Priscilla about her relationship with the maternal grandfather, she replied that it was not good but refused to elaborate further with regards to this. Therefore, the registrar cannot confirm with Priscilla with regards to the incident where the maternal grandfather had hugged Priscilla while she was naked as has been claimed by Regina.

76. When it comes to her father, Priscilla informed the court that she is very happy whenever she is with the father and also Regina. Her father will always buy whatever that has been requested by her. But with the mother; respondent wife always refused to buy her things and give the excuse that it is expensive.

77. Priscilla has expressly mentioned to the registrar that she likes to stay with the father more as the father has never scolded her, same goes with the paternal grandmother. Both of them have never asked her to do things that she does not like.

78. Priscilla did inform during the interview session that she has two diaries. No one has ever read her diaries. Her father's side has knowledge about the existence of this diary but on her mother's side, no one knows. She did write it by herself. There is one school diary that has been written by Priscilla and when it came to know by the mother, her mother threw it away. Her mother will inspect everything once she returned from Kuala Lumpur. Her mother wanted to erase everything and that is why her mother threw away her diary.

79. The registrar did ask Priscilla about the Singapore access. Priscilla told the court that she had been there once. She admitted the event where Regina got slapped by their uncle because of the quarrel between Regina and Desmond, their cousin. After the quarrel, their uncle came to the scene and slapped Regina.

80. With regards to her school result, she informed the court that she got an excellent result. Her favorite subject is Mathematics while Bahasa Melayu and also Bahasa Cina are the least favourite.

81. Priscilla also told the court that her uncle had beaten her using the belt but not that often. The example of incident where Priscilla told us she got beaten by her uncle using the belt was where Priscilla wanted to watch television and it was 9.30pm which was quite late for them.

82. Priscilla did mention few times that she is very close to her sister, Regina and want to spend more time with her.

83. The registrar has asked Priscilla whether she has met the doctors or not. Prisicilla informed that she had sessions with the doctors where there were two doctors from the father's side and also the other two doctors from the mother's side.

84. Priscilla informed the court that she will only see her father on Friday until Sunday and she does not mind to go and meet her father everyday.

85. When the registrar asked her which one she is going to choose in between Kuala Lumpur and Penang, she answered Kuala Lumpur is better.

86. There was one event that Priscilla has told the registrar where the parents had

quarrel at the airport.

87. Priscilla has also expressed her feeling where she said that she loves them both (the petitioner husband and the respondent wife) and she wants them to reconcile.

Regina

88. Regina was 14 years old at the time where the interview session was conducted.

89. Her hobby is watching the Korean Drama.

90. She is staying at Ara Damansara.

91. Regina told the court that everytime Priscilla has to go to the court, she will get new stuff from the mother.

92. Regina did tell the registrar about the incident happened in Singapore and affirmed this. She managed to tell the court what has happened in Singapore where she got slapped by his uncle after pushing Desmond and her intention was only to protect Priscilla.

93. Regina informed the court that when she was staying with Priscilla during the Penang access, there were times where their uncle pinched and hit Priscilla.

94. Regina can see that Priscilla is really happy when she is staying in Kuala Lumpur with her, their father and grandmother.

95. The relationship between her and the cousins from her mother's side is also not that good.

96. Regina told the registrar that her maternal grandmother hates her and always acted unreasonably towards her. Her grandmother always mentioned anything she does that is related to her father. She even can say that she is grateful for not being that close with the mother as their relationship with her relatives in Penang is not so well. She is also grateful that her mother did not take her away as well in 2010 when her mother left matrimonial home and brought Priscilla with her.

97. Surprisingly, Regina can claim and mention to the court that her mother only wants money from the petitioner husband and their paternal grandmother can take a very good care of Priscilla, replacing their mother. This shows Regina's unpleasant feeling towards her biological mother after what has happened to her and Priscilla.

98. Regina also informed the court that her father has a girlfriend and she is really nice. There are times that her father's girlfriend cooks for them at home.

...

[52] Based on the outcome of this interview session with the children, it can be concluded that Priscilla is not really happy to stay in Penang. She wished to stay in Kuala Lumpur with her father, Regina and paternal grandmother. Priscilla has expressly shown her unpleasant feeling about her relationship with the family members of the respondent wife in Penang.

[53] The mistreatment received by Priscilla has made she feels uncomfortable to stay in Penang. She did mention about her bad relationship with her cousins and uncles which make her unhappy to stay in Penang.

ISSUE ON THE MAINTENANCE OF THE SPOUSE

[54] I now come to the other prayer. The petitioner husband seeks to vary the order for maintenance of RM1,000 per month for the respondent wife. The petitioner husband has given evidence that he is now able to afford and willing to make a lump sum payment of RM30,000 to the respondent wife in lieu of future maintenance to be paid by the petitioner husband to her.

[55] The petitioner husband believes that a lump sum payment to the respondent would help to solve that constant altercation between the respondent wife and himself over the issue of money.

[56] In order for the court to vary this order of maintenance of a spouse, the court must satisfy that the order was based on any misrepresentation or mistake of fact or where the has been any material change in the circumstances.

[57] However, the petitioner husband has failed to prove any of these grounds in order to satisfy the court to vary the order on the maintenance of the respondent wife. After perusing the submission of the parties and the reports carefully, I dismiss this application with regard to the variation order on the maintenance for the respondent wife and maintain the previous order of RM1,000 per month to be paid to the respondent wife for her maintenance.

SUMMARY

[58] I am of the view that the petitioner husband managed to prove to the court the material changes in the circumstances that warrants the court to make an order for variation with regards to the custody, care and control of Priscilla. Mistreatment received by Priscilla from the other family members of the respondent wife in Penang is unacceptable. The fact that Priscilla is living with all of them under the same roof must be highly taken into consideration to ensure the well-being of Priscilla at all times. The respondent wife did not mention to the court that she will be moving out from the house inspite of the ill-treatment received by Priscilla. The respondent wife cannot give the assurance with regards to her financial stability to take care of Priscilla as she has testified to the court that she is willing to quit her current employment in order to find more flexible job ie online business so that she can work from home and spend more time with Priscilla. However, this has yet to be materialised.

[59] Priscilla's firm intention to stay in Kuala Lumpur with her father, sister, paternal grandmother and paternal grandfather has been clearly reflected based in the interview sessions with the registrar as well as the medical reports prepared by Dr Alex Ng and Dr Mary Joseph Marret. During the investigation, the petitioner husband managed to explain to the court his long-term and future plan for Priscilla which is more convincing to the court to transfer the custody, care and control order to the petitioner husband. The petitioner husband has his own company and he can delegate his work to his employee in any event that Priscilla needs his care and attention. Furthermore, the petitioner husband has made a good offer towards the respondent wife to support return air flight ticket for every access by the respondent wife towards Priscilla maximum twice a month. This would be less burdened to the respondent wife to have access towards Priscilla even though she is staying in Penang.

CONCLUSION

[60] Having considered the evidence adduced in court, report prepared by the registrar and submissions by both learned counsel, it is hereby ordered that:

(a) the application by the petitioner husband for variation of custody, care and control order of paras 2, 3, 5, 7, 8, 10, 11, 12, 13, 14, 15, 15A, 16, 17, and 18 as well as to add new para 24 to the said amended decree nisi are hereby allowed;

(b) the application by the petitioner husband for variation on maintenance order of the respondent wife under para 19 as well as to add new para 25 to the said amended decree nisi are hereby dismissed;

(c) the respondent wife is ordered to give Priscilla to the petitioner husband on 17 March 2017 at 3pm at McDonald Autocity Juru, Pulau Pinang;

(d) as has been agreed by both parties, para 24A is added to order the petitioner husband to send an email to the respondent wife for notification with regards to the travel ticket at least one week before the date of travel;

(e) both parties have also agreed to add para 24B where it shall state that the respondent wife shall notify the petitioner husband via email at least 30 days before her access period to the children in the event she is unable to exercise the said access; and

(f) each party bears its own costs.

Application by petitioner for variation of custody, care and control order allowed;

application by petitioner for variation on maintenance order for respondent dismissed.

Reported by Dzulqarnain Ab Fatar